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In the Supreme Court of the United States

OCTOBER TERM, 1975

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER
v.
SANDRA WETZEL, ET AL.

GENERAL ELECTRIC COMPANY, PETITIONER
v.
MARTHA V. GILBERT, ET AL.

MARTHA V. GILBERT, ET AL., PETITIONER
v.
GENERAL ELECTRIC COMPANY

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether a private employer's exclusion of pregnancy and pregnancy-related disabilities from an

otherwise comprehensive employee disability income protection plan constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*

INTEREST OF THE UNITED STATES

The responsibility for federal enforcement of Title VII has been given by Congress to the Department of Justice, the Equal Employment Opportunity Commission, and the Civil Service Commission. Under 42 U.S.C. (Supp. IV) 2000e–5(f)(1), the Equal Employment Opportunity Commission may bring a civil action against a private employer if, following the filing of an individual's charge with the Commission, conciliation efforts fail. When the employer is a government, governmental agency, or political subdivision, excluding the federal government, the Commission may refer the case to the Attorney General for suit. When federal employment practices are at issue, the Civil Service Commission, in addition to exerting oversight responsibility to insure nondiscrimination in federal employment, serves as the reviewing administrative authority for Title VII charges filed by individual employees against federal agencies. 42 U.S.C. (Supp. IV) 2000e–16.

Both the Equal Employment Opportunity Commission and the Civil Service Commission have issued guidelines to effectuate the provisions of Title VII. Two of the EEOC guidelines, 29 C.F.R. 1604.9 and 1604.10, are directly applicable here and were relied upon by both courts of appeals in support of their decisions in these cases[1] (*Wetzel* v. *Liberty Mutual,*

511 F.2d 199, 204, n. 5 (C.A. 3); *Gilbert* v. *General Electric Co.,* 10 FEP Cases 1201 (C.A. 4), opinion printed in the Supplemental Brief of all Parties to the Joint Petition for a Writ of Certiorari,[2] at 3a, n. 7).

Moreover, pursuant to Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681, the Department of Health, Education, and Welfare promulgated regulations concerning pregnancy disability which were signed by the President and submitted to the Congress. Although these regulations are not applicable here since petitioners are not within the ambit of the education amendments, the validity of this administrative interpretation will be affected by the Court's decision in these cases.

Also, since resolution of these cases will affect the responsibilities not only of private employers, but of governmental employers as well, the Court's decision will affect the Title VII enforcement responsibility of several federal agencies.

STATEMENT

The petitioner employers in the cases before this Court are private employers which maintain income disability protection plans designed to help employees

[1] Although federal maternity leave policies are not directly involved in either suit, they are consistent with the policies reflected in these EEOC guidelines. Pregnancy disability leave is treated under the same sick leave provisions as are all other disabilities. See *Federal Personnel Manual*, Chapter 630, Subchapter 13, § 13–2 (April 30, 1975). See also 5 C.F.R. 630.401(b).

[2] Hereinafter cited "Jt. Supp. Pet."

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through periods of disability. The plans, to which employees must subscribe, accomplish this by providing the disabled employee with a percentage of his or her weekly income during the period of disability. Both plans specifically exclude pregnancy disability from coverage.

1. *Liberty Mutual Insurance Co.* v. *Wetzel*

This suit was filed as a class action, alleging a broad range of sexually discriminatory treatment,[3] including the exclusion of pregnancy from the income disability plan. The plan states that "[w]hen disability from illness or accident keeps you away from work, your Income Protection Plan is designed to continue a portion of your usual earnings" (Br. of Lib. Mut. at A2).

In addition to excluding disability from pregnancy or any cause related to pregnancy, the Liberty Mutual plan excludes disability caused by acts of war or undeclared war, attempted suicide or intentionally self-inflicted injury, or any disability not requiring the attendance of a physician licensed to prescribe and administer drugs and to perform all surgical procedures (App. 99).[4]

The employee covered by the Liberty Mutual plan

[3] Other issues initially in this suit involved pay differentials, discriminatory hiring practices, discriminatory job classifications, and maternity leave practices. These issues were resolved below adversely to the employer and are not before this Court. See 508 F.2d 239 (C.A. 3), certiorari denied, 421 U.S. 1011, and 511 F.2d 199 (C.A. 3), certiorari granted on another issue, 421 U.S. 987.

[4] Citations to the *Wetzel* appendix appear as "App."

pays 33 cents per one hundred dollars of salary (App. 99). According to the petitioner's booklet, this is approximately one-third the cost of the plan, and the balance is paid for by the petitioner (App. 99).

On plaintiffs' motion for summary judgment, the district court held that the employer's practice violated Section 703(a) of Title VII and granted plaintiffs' motion for partial summary judgment (372 F. Supp. 1146 (W.D. Pa.)). The Third Circuit affirmed (511 F.2d 199). The court of appeals rejected petitioner's reliance on this Court's opinion in *Geduldig* v. *Aiello*, 417 U.S. 484, holding that the constitutional interpretation of *Geduldig* was not directly applicable to the statutory interpretation of Title VII. The court noted, and deferred to, the applicable EEOC guideline (29 C.F.R. 1604.10(b)) which indicates that benefits are to be applied to pregnancy disability on the same basis as benefits are applied to other disabilities. The court of appeals rejected petitioner's justifications for excluding pregnancy from the disabilities covered by its plan, and concluded that the practice violated Title VII because "[t]he company's policy is neutral on its face but treats a protected class of persons in a disparate manner. This is precisely what Title VII intends to strike down." 511 F.2d at 206–207.[5]

[5] Liberty Mutual did not offer to introduce any evidence in support of its contention that the costs of including pregnancy-related disabilities preclude its expanding the coverage of its plan (see 511 F.2d at 206). Instead, it took the position that the cost of including pregnancy-related disabilities could not be reliably estimated (App. 165, 194).

2. *General Electric Co.* v. *Gilbert*

This suit was also filed as a class action, limited to the issue of exclusion of pregnancy from GE's disability income protection plan. The plan, which includes sickness and accident coverage, as well as life and medical insurance components, states that "[t]his plan is designed to help you and your dependents meet the threats to security that are brought about by loss of wages through death or disability and the medical expenses which occur when you or one of your dependents have a sickness or accident" (III App. 1062).[6] The plan excludes only disability from pregnancy (or suffered while absent from work due to pregnancy, see II App. 423) or from complications in connection with pregnancy and childbirth (III App. 1066).[7] The GE Sickness and Accident Insurance Plan, at one time financed partially by employee contributions, is at present financed totally by the employer (III App. 1067), which is a self-insurer (I App. 175, 241).

Following a trial, the district court held that the exclusion of pregnancy-related disabilities violates Title VII's prohibition against sex discrimination. The court of appeals affirmed, finding that the exclusion is sex-linked and a violation of Title VII, and that pregnancy-related disabilities do not differ significantly from other disabilities covered by the plan. As in *Wetzel*, the court rejected the "voluntariness" distinction offered by the employer, finding that the plan covers other disabilities voluntarily incurred (Jt. Supp. Pet. 6a–7a). The court, as did the Third Circuit in *Wetzel*, rejected petitioner's reliance on *Geduldig*, *supra*, noting that Title VII's standards were not the same as those applied by this Court in *Geduldig*.

[6] Citations to the *Gilbert* Appendix appear as "(volume no.) App."

[7] Coverage is included, *inter alia*, for elective surgery, for disabilities resulting from self-inflicted injuries (including attempted suicide), and for disabilities resulting from an employee's commission, or attempt to commit, an assault, battery or felony (II App. 608, 614–615).

Unlike the petitioner in *Wetzel*, GE had offered evidence in the district court on the issue of increased cost of inclusion of pregnancy benefits for the purpose of disproving intent to discriminate. The district court viewed the cost evidence within the context of a business necessity defense, and found that the standard imposed by that defense was not proved by the cost evidence. The court of appeals held the cost evidence irrelevant, noting that it was not offered as a business necessity defense (and, indeed, that such a defense was specifically disclaimed), but to disprove the possibility of proof of invidious intent left open by *Geduldig*. Because *Geduldig* was inapplicable, the court of appeals ruled, it had no occasion to consider the cost evidence (Jt. Supp. Pet. 10a–11a and n. 23).

SUMMARY OF ARGUMENT

By including sex as one of the prohibited bases of discrimination in Title VII of the Civil Rights Act of 1964, Congress enacted a broad prohibition against employment practices which differentiate between employees on a sexual basis to the detriment of either sex. See *Fitzpatrick* v. *Bitzer*, 10 FEP Cases 956, (C.A. 2), certiorari granted on other issues, Decem-

ber 15, 1975 (No. 75–251). The disability insurance plans at issue here comprehensively cover all substantial risks of employee income loss due to disability except for pregnancy-related disabilities. Their net effect, therefore, is to subject only women employees to a substantial risk of total loss of income because of temporary medical disability. This is necessarily a discrimination on the basis of sex in *prima facie* violation of Title VII, regardless of the extent to which women as a statistical group benefit from the plans' coverage of other causes of disability. Whether or not the latter consideration might in other circumstances justify special treatment of pregnancy coverage within a disability plan, it cannot compensate for subjecting only women to the risk of disability without income protection by total exclusion of pregnancy-related disabilities from the present, otherwise comprehensive plans.

This Court's decision in *Geduldig* v. *Aiello,* 417 U.S. 484, is not to the contrary. As the six courts of appeals which have addressed the issue have unanimously stated, the Court's hold in *Geduldig* that the Fourteenth Amendment permits a state to proceed one step at a time in enacting a disability benefits program does not require or even suggest that Congress' comprehensive (rather than one-step-at-a-time) prohibition of all forms of sex discrimination in employment in Title VII should be interpreted to permit exclusion of pregnancy coverage from otherwise comprehensive employee disability insurance plans.

Nor did the courts below err in relying on the applicable guideline of the Equal Employment Opportunity Commission. There is no indication that the guideline is contrary to congressional intent, and this Court has explicitly stated that the fact the responsible agency has changed its position on an issue does not mean that its current interpretative regulation is not entitled to judicial deference.

Finally, petitioners' asserted justifications for the pregnancy exclusion do not constitute the showing of business necessity required to rebut a *prima facie* violation of Title VII. The justifications offered here are solely cost-related, and petitioners have not shown that the cost of a disability insurance program which accommodates pregnancy disability would in some manner be prohibitive. Regardless of whether some actuarial-based method of insuring the risk of pregnancy-related disability might be devised that would apportion the costs of the program fairly and still be consistent with Title VII, the complete exclusion presented in these cases is prohibited by Title VII.

ARGUMENT

I

TITLE VII FORBIDS THE COMPLETE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM THE BENEFITS AFFORDED BY AN EMPLOYER'S INCOME PROTECTION PLAN WHICH PROTECTS EMPLOYEES AGAINST OTHER, SIMILAR DISABILITIES

A. THE EXCLUSION OF PREGNANCY-RELATED DISABILITY FROM THE PLANS HERE AT ISSUE IS A *PRIMA FACIE* VIOLATION OF TITLE VII

In enacting Title VII of the Civil Rights Act of 1964, Congress established a broad prohibition of un-

equal treatment by employers of their employees on the basis of race, religion, national origin, or sex. This Court, on the several occasions when it has considered Title VII in the context of racial discrimination, has recognized that Congress' purpose in enacting Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800. See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–430. Since Section 703(a) established a similar prohibition for discriminatory practices based on sex, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, it is clear that Title VII was intended as well to eliminate employment practices[8] which disparately treat men and women:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

[8] Petitioner GE argues that a benefit of employment is less "significant" than an employment opportunity and is afforded less protection by Title VII (see Br. of GE at 53–54.). The Act, however, specifically states (Section 703(a)) that it is an unlawful employment practice to "fail or refuse to hire * * *, or otherwise to discriminate * * * with respect to compensation, terms, conditions, or privileges of employment, because of * * * sex," indicating no difference between its prohibition of discrimination in hiring and in other areas of employment practices. See 29 C.F.R. 1604.9(b), the EEOC guideline which prohibits discrimination in the application of fringe benefits in similar terms, which is set forth at p. 33, *infra*. See also *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (C.A. 3); *Rogers* v. *Equal Employment Opportunity Commission*, 454 F.2d 234 (C.A. 5).

Sprogis v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (C.A. 7), certiorari denied, 404 U.S. 991. Although present judicial standards for assessing challenges made under Title VII have, for the most part, arisen in cases considering practices found to affect employees detrimentally on a racial basis, those standards are equally applicable to sex-based claims, and provide proper guidance for deciding whether the practice violates Title VII. *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040, 1042–1043 (C.A. 6); *Bowe* v. *Colgate, Palmolive Co.*, 489 F.2d 896, 900 (C.A. 7).

In *Griggs, supra,* this Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (401 U.S. at 431), and emphasized that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (*id.* at 432). See also *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405. Accordingly, an employment practice may be found to be a *prima facie* violation of Title VII's prohibition against sexual discrimination either by proof that it is specifically directed only at one sex, *Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F.2d 288 (C.A. 5), or by proof that the practice, however sexually neutral it appears to be, affects primarily members of one sex, *Danner* v. *Phillips Petroleum Co.,* 447 F.2d 159 (C.A. 5).

The disability insurance plans before this Court both specifically exclude pregnancy disability from their otherwise comprehensive coverage. Their underlying purpose is, of course, to protect the disabled

employee against the twin hardships of loss of income due to inability to work and medical expenses. The disabled pregnant employee, however, is no less affected by the need for such protection than is any other disabled employee. And, in contrast to the other, quite unusual causes of disability not covered by the Liberty Mutual plan which affect both men and women (see p. 4, *supra*), "[p]regnancy is," as the court of appeals stated in *Gilbert*, "a condition unique to women" (Supp. Jt. Pet. 4a).

The net result of the pregnancy exclusion in these plans, therefore, is to subject only women to a substantial risk of total loss of income because of temporary medical disability.[9] Men (and, of course,

[9] Both petitioners seek to distinguish pregnancy from the conditions covered by their respective plans to justify its exclusion (see Br. of Liberty Mutual at 16–19; Br. of GE at 62–66). Primary reliance is placed on the proposition that pregnancy is a voluntary condition, and not a sickness or a disease, and, therefore, may properly be excluded from an employee insurance program designed to provide benefits to employees unable to work due to sickness or disease-related disability.

Both courts of appeals rejected this alleged distinction (*Wetzel*, 511 F.2d at 206, *Gilbert*, Jt. Supp. Pet. at 6a–7a). Both plans cover disabilities which result from voluntary activities, such as sports injuries or venereal disease (which, like pregnancy, may be an unintended consequence of voluntary sexual activities). Similarly, both plans cover voluntarily incurred disabilities resulting from cosmetic or other elective surgery, rather than from sickness or disease. In addition, pregnancy may not always be voluntary, and the complications of pregnancy, which are a sickness not voluntarily assumed, are also excluded from the petitioners' plans (App. 99, III App. 1066). In short, the purpose of these plans is comprehensively to provide a temporary source of income to employees unable to work due to physical disability, and there is no sexually neutral basis for the exclusion from these plans of pregnancy-related disability.

To the extent the pregnancy exclusion may reflect concern with possible malingering or with the possibility that the employee may not return to work after the period of disability, there are obvious means available for dealing more comprehensively with those concerns without discriminating against pregnancy-related disabilities.

women physically unable to become pregnant) are subject to no such risk under the General Electric plan and to only slight risk of that consequence (a risk also shared by all the women) under the Liberty Mutual plan.

The fact that the plans subject only some, rather than all, of the women employees to this substantial risk is not significant for Title VII purposes, since it is settled that the Act affords protection against discriminations based on sex (or race, etc.) plus another characteristic. See *Phillips* v. *Martin Marietta Corp.*, *supra* (employment distinction based on parental status excluded only women); *Sprogis*, *supra* (employment distinction based on marital status excluded only women).

Nor, in our view, can there be a basis for rebutting the *prima facie* discriminatory effect of the pregnancy exclusion in the fact that women (if not absent from work due to pregnancy) are entitled to share equally with men in the benefits afforded by the plans for non-pregnancy-related disabilities. Even if it could be shown that women as a statistical group are receiving a larger proportional share than men of these other benefits, that would not compensate for

the fact that only women (including women who may never receive any benefits) are subject under the plans to a substantial risk of total income loss because of medical disability. Insulating men from that risk while leaving women subject to it is necessarily discriminatory—regardless of whether evidence of costs and actuarial statistics could ever be used (short of a showing of business necessity, discussed in point II, *infra*) to rebut the *prima facie* inference of discrimination that would arise from special treatment (such as increased employee premium charges or reduced benefits) of pregnancy coverage within a comprehensive disability plan.[10] The latter issue is, of course,

[10] An employer providing such special treatment of employees requiring pregnancy coverage might thus seek to distinguish between a statistical rebuttal of a *prima facie* inference of discrimination and the showing of business necessity required to rebut a *prima facie* inference of a violation (when the inference of discrimination remains unrebutted). Whether Title VII permits such statistically based "play in the joints" is a matter of controversy that arises in various contexts. See, *e.g.*, *Manhart* v. *City of Los Angeles*, 387 F. Supp. 980 (C.D. Cal.), pending on appeal, C.A. 9, Nos. 75–2729 and 75–2807 (involving employee pension annuity plans). The Equal Employment Opportunity Commission has, for the most part, taken the position that disparate treatment of individuals on the basis of sex (or race, etc.) can be justified only by a showing of business necessity, and not merely by reliance on statistical characteristics of a protected class to which those individuals (who may or may not be typical of the class) belong. On the other hand, a pertinent regulation of the Wage and Hour Division of the Department of Labor under the Equal Pay Act, 77 Stat. 56, as amended, 29 U.S.C. 206(d), interprets that Act as permitting some flexibility in the present context:

"*Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." 29 C.F.R. 800.116(d).

not before the Court since both of the plans here totally exclude pregnancy-related disabilities from coverage.

Petitioners in both cases appear to argue that the exclusion of pregnancy benefits does not violate Title VII because there is no distinction between men and women under the exclusion (see, *e.g.*, Lib. Mut. Br. in *Wetzel* at 21), suggesting that, because men do not become pregnant, the exclusion of pregnancy benefits does not disparately treat men and women employees.[11]

The fact that women have different physical attributes from men does not, without more, justify applying different rules to women employees based on those attributes. "Discrimination is not to be tolerated [under Title VII] under the guise of physical properties possessed by one sex." *Sprogis, supra,* 444 F. 2d at 1198. In cases where employment practices which

[11] To this end, both Liberty Mutual and General Electric place primary reliance on this Court's opinion in *Geduldig* v. *Aiello*, *supra*, which held that the exclusion of pregnancy disability from a California disability insurance, social welfare program did not violate the Fourteenth Amendment by invidiously discriminating against women. For the reasons set forth below (see pp. 18–22, *infra*), the decision in *Geduldig* does not establish that the practice here is not a *prima facie* violation of Title VII.

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detrimentally affected women employees were based on physical properties of women generally, this justification has not been accepted as a barrier to the establishment of a *prima facie* case but has been considered only in the context of whether the business necessity defense justifies the sexual classification, or the sexual effect of the particular practice involved. For example, in *Rosenfeld* v. *Southern Pacific Company,* 444 F.2d 1219 (C.A. 9), the employer refused to assign women to certain jobs, based in part on the view that the "arduous nature of the work-related activity renders women physically unsuited for the jobs" (*id.* at 1223). The court in *Rosenfeld* found the exclusion of women to be a *prima facie* violation of Title VII, and then examined the "strenuous physical demands" defense to see if sufficient justification for the practice was presented. See also *Bowe, supra,* and *Weeks, supra* (weight lifting limitations applied only to women were a *prima facie* violation); *Cheatwood* v. *South Central Bell Tel. & Tel. Co.,* 303 F. Supp. 754 (M.D. Ala.) (weight lifting requirement and the possible unavailability of restroom facilities could not justify exclusion of women).

In sum, the classifying factor, pregnancy, is not capable of being applied to both sexes, but is itself sexual in nature. Accordingly, while nearly all disabling conditions are covered, one which is tied directly to sex is not. Even though the pregnancy classification—involving a dichotomy between pregnant females and non-pregnant persons—may be regarded as

a sexually "neutral" policy, not aimed at women but only at a particular disability (see *Geduldig* v. *Aiello, supra,* 417 U.S. at 496–497, n. 20), the *prima facie* case of discrimination under Title VII is not disproved. For the pregnancy exclusion is, nonetheless, an instance of the application of an employment practice only to women, resulting in the denial of a benefit. And it is settled under Title VII that when an employment practice has the practical effect of distinguishing among employees on the basis of a prohibited factor to the substantial detriment of one such class, a *prima facie* violation of the statute has been proved. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs, supra,* 401 U.S. at 432.[12]

[12] Accordingly, all circuits have accepted the view that a statistical demonstration of a substantial disparate effect, regardless of motivation, on a characteristic covered by Section 703(a), is a *prima facie* violation of Title VII. *Boston Chapter, NAACP* v. *Beecher,* 504 F. 2d 1017, 1020, n. 5 (C.A. 1), certiorari denied, 421 U.S. 910; *United States* v. *Wood, Wire and Metal Lath. Int'l Union, Local No. 46,* 471 F. 2d 408, 414, n. 11 (C.A. 2), certiorari denied, 412 U.S. 939; *Commonwealth of Pennsylvania* v. *O'Neill,* 473 F. 2d 1029 (C.A. 3) (*en banc*); *United States* v. *C & O Ry. Co.,* 471 F. 2d 582, 586 (C.A. 4), certiorari denied, 411 U.S. 939; *United States* v. *Hayes Int'l Corp.,* 456 F. 2d 112, 120 (C.A. 5); *Danner, supra,* 447 F. 2d at 162; *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.,* 497 F. 2d 871, 875 (C.A. 6); *United States* v. *United Bro. of Carpenters and Joiners, Local 169,* 457 F. 2d 210 (C.A. 7), certiorari denied, 409 U.S. 851; *United States* v. *N. L. Industries, Inc.,* 479 F. 2d 354, 368 (C.A. 8); *United States* v. *Ironworkers Local 86,* 443 F. 2d 544, 550–551 (C.A. 9), certiorari denied, 404 U.S. 984; *Muller* v. *U.S. Steel Corp.,* 509 F. 2d 923, 927 (C.A. 10); *Davis* v. *Washington,* 512 F. 2d 956, 960 (C.A.D.C.), certiorari granted, No. 74–1492 (October 6, 1975).

B. THIS COURT'S DECISION IN *GEDULDIG* V. *AIELLO* DOES NOT BAR A FINDING THAT A CLASSIFICATION BASED ON PREGNANCY VIOLATES TITLE VII

Both employers place primary reliance on this Court's opinion in *Geduldig* v. *Aiello, supra,* contending that the holding of that case is "dispositive" of the issue before this Court (*e.g.,* Br. of GE at 26). There are, however, important differences between the context in which *Geduldig,* a Fourteenth Amendment, social welfare case, arose, and the applicable requirements of Title VII.

Accordingly, six courts of appeals—the only appellate courts which have considered the issue—have stated, in holding or dictum, that *Geduldig* did not determine the validity of the pregnancy exclusion in the context of Title VII's statutory prohibition of any discrimination based on sex, and that such exclusion could amount to sex discrimination in violation of Title VII. See, in addition to the opinions of the two courts below, *Communications Workers of America* v. *American Telephone and Telegraph Co.*, 513 F. 2d 1024 (C.A. 2), petition for a writ of certiorari pending, No. 74–1601; *Satty* v. *Nashville Gas Co.,* 11 FEP Cases 1 (C.A. 6); *Hutchison* v. *Lake Oswego School District,* 519 F. 2d 961 (C.A. 9; *Tyler* v. *Vickery,* 517 F. 2d 1089 (C.A. 5).[13] The two courts below have, of

[13] In *Satty* and *Hutchison* the question was the use of accumulated sick leave, rather than exclusion from a disability program. However, the opinions of the Sixth and Ninth Circuits considered the situation as equivalent to that presented by the exclusion of pregnancy from a disability program. The Fifth Circuit opinion in *Tyler* is not addressed to a sex discrimination claim, but in distinguishing between constitutional and Title VII standards for

course, explicitly held that exclusion of pregnancy and pregnancy-related disabilities from a general disability program does amount to unlawful sex discrimination in violation of Title VII.[14]

In *Geduldig* this Court held that the exclusion of pregnancy and pregnancy-related disabilities from a state-run program of employment disability insurance for private employees does not violate the Fourteenth Amendment by invidiously discriminating against women.

As the court of appeals decisions distinguishing *Geduldig* have noted, questions arising in the social welfare context[15] under the Fourteenth Amendment differ significantly from the issue of statutory construction involved here. The Fourteenth Amendment does not prohibit a policy which, while treating people differently, is reasonably related to a legitimate state interest. In order to prevail a challenger has the burden of showing that the classification is not ra-

determining discrimination the court in dictum discusses *Geduldig* and indicates its concurrence with the other circuits that *Geduldig* does not govern a Title VII claim of discrimination regarding the differential treatment of pregnancy disability. See also *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (C.A. 8), which implicitly finds the *Geduldig* decision inapplicable in a Title VII context.

[14] Congress has also given the question attention since this Court's decision in *Geduldig*. See pp. 24–26, *infra*.

[15] The principal cases relied on in this Court's opinion in *Geduldig* specifically emphasize the fact that they deal with social welfare legislation. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546–547; *Dandridge* v. *Williams*, 397 U.S. 471, 485; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

tionally related to a legitimate state policy, or that it is invidious.

Title VII on the other hand is directed not only to deliberate or irrational acts of employment discrimination. Under Title VII, a practice which is neutral on its face and is not either irrational or a pretext for discrimination is nevertheless discriminatory if it has a substantial disparate effect on a protected class. See p. 17, *supra*, and cases there cited. See also *Wallace* v. *Debron Corp.*, 494 F. 2d 674 (C.A. 8); *Gregory* v. *Litton Systems, Inc.*, 472 F. 2d 631 (C.A. 9).

Indeed, this Court in *Geduldig* specifically relied (417 U.S. at 495) on the proposition "that, consistently with the Equal Protection Clause, a State 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . .' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 * * *." But, in contrast to the state legislation at issue in *Geduldig* and in *Williamson*, Congress in Title VII took the broad view that all forms of employment discrimination—on the basis of race, sex, religion and national origin—should be abolished. Congress, in other words, decided to cover the field comprehensively rather than take one step at a time.

That Title VII standards are more stringent than the rational basis standard under the Fourteenth Amendment is well recognized, both by Congress and the courts. The extension of coverage to the states as

employers in the 1972 amendments to Title VII represented an at least implicit recognition by Congress that Fourteenth Amendment standards, to which the states were already subject as employers, are in some respects less exacting than Title VII standards.

And, in several factual contexts, the differences between Title VII and Fourteenth Amendment standards have been found by the courts to require different legal results. State protective labor laws restricting the weight women can lift, the hours women can work, or other conditions of women's employment, have traditionally been upheld under the Fourteenth Amendment as permissible regulation of the public health and safety.[16] Under Title VII, however, state maximum-hour and weight-lifting laws for women, which have the effect of limiting their employment opportunity, have uniformly been struck down. *Weeks* v. *Southern Bell Tel. & Tel. Co., supra; Rosenfeld* v. *Southern Pacific Company, supra.* Similarly, in *Goesaert* v. *Cleary*, 335 U.S. 464, the Court upheld, against an Equal Protection attack, a state law restricting employment opportunity in bartending to women who were the wives or daughters of male bar

[16] In *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 398, in upholding a state minimum wage law for women as protective legislation, the Court stated:

"[T]imes without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

owners. A contrary result was reached under Title VII since it could not be shown that male sex was a bona fide occupational qualification necessary to the performance of the job. *Krause* v. *Sacramento Inn*, 479 F. 2d 988 (C.A. 9).[17]

In short, as the courts of appeals have unanimously held, the fact that a policy has been held not to violate the Fourteenth Amendment is not a holding that it does not violate Title VII. Accordingly, the *prima facie* cases of statutory violation shown here (see point IA, *supra*) stand unrebutted by petitioners' reliance on *Geduldig*.

C. GUIDELINES ISSUED BY THE RESPONSIBLE ADMINISTRATIVE AGENCY PROPERLY INTERPRET TITLE VII TO PROHIBIT THE EXCLUSION OF PREGNANCY-RELATED DISABILITY FROM AN OTHERWISE COMPREHENSIVE DISABILITY BENEFITS PLAN

The Equal Employment Opportunity Commission sex discrimination guidelines, 29 C.F.R. 1604.9 and 1604.10, explicitly provide that disabilities caused by pregnancy are, for purposes of disability insurance plans, to be treated as are all other temporary disabilities. 29 C.F.R. 1604.10(b).[18] The courts of appeals in both *Gilbert* and *Wetzel* relied on the guidelines, indicating that they are entitled to "great deference" (*Wetzel*, 511 F. 2d at 204; *Gilbert*, Jt. Supp. Pet. at

[17] See also *Kotch* v. *Board of River Pilot Commissioners*, 330 U.S. 552; *Tyler* v. *Vickery*, 517 F. 2d 1089 (C.A. 5); *Smith* v. *Troyan*, 520 F. 2d 492 (C.A. 6), petition for a writ of certiorari pending, No. 75-734.

[18] The EEOC Guidelines are set forth in the Appendix, *infra*, p. 33.

5a, n. 12). This Court has consistently paid such deference to guidelines properly issued by federal agencies given the responsibility for their promulgation. See, *e.g. Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 431; *Griggs* v. *Duke Power Co., supra.*, 401 U.S. at 433–434; *Udall* v. *Tallman*, 380 U.S. 1.

Petitioner GE contends that the EEOC Guidelines are not entitled to judicial deference because they were not issued contemporaneously with the congressional statute they interpret, and because EEOC has, in the past, taken an assertedly contrary view. While there are circumstances in which such guidelines may not be entitled to judicial deference, see, *e.g., Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, this is not a case in which the guidelines are inconsistent with an obvious congressional intent.[19] Further, this Court, in *Espinoza*, did not state that simply because a guideline is not issued contemporaneously with a statute, or because an agency changes its position on an issue, the guideline is due no deference. To the contrary, the Court in *Espinoza* specifically noted that the Commission had changed its position on the issue involved

[19] In *Espinoza*, this Court held that the term "national origin" in Title VII did not prohibit discrimination on the basis of an individual's status as an alien. The EEOC guideline had interpreted the term "national origin" to include discrimination on the basis of citizenship. The Court held that this guideline was not valid if it meant that there could be no discrimination on the basis of citizenship alone, but that it could be valid in situations where a citizenship requirement would have the effect of discrimination on the basis of national origin, a problem not presented in *Espinoza*. See 414 U.S. at 93.

there and stated that "[t]he Commission's more recent interpretation of the statute in the guideline * * * is no doubt entitled to great deference" (414 U.S. at 94) while holding that it must nonetheless be rejected because of what the Court found to be "an obvious congressional intent" to the contrary (*ibid.*).[20]

Here, not only is there no indication of a legislative intent contrary to the Commission's guidelines in the legislative history of Title VII,[21] there is also some recent indication that Congress does not disagree with that interpretation. This results from the fact that Congress recently had the opportunity to review closely analogous guidelines promulgated by the Department of Health, Education, and Welfare. Those

[20] In addition, the Court in *Espinoza* found some federal employment practices to be in conflict with the EEOC guideline discussed in that case. 414 U.S. at 89–90. In the present case, federal pregnancy leave practices are fully consistent with the guideline at issue here. See p. 3, n. 1, *supra*.

The Office of Federal Contract Compliance of the Department of Labor has issued guidelines concerning sex discrimination by federal contractors, which state that, in the area of contributions to insurance plans, an employer is not in violation of the guidelines if his contributions are the same for both sexes, or if the resulting benefits are equal. 41 C.F.R. 60–20.3(c). However, more recent proposed guidelines published, but not yet adopted, by OFCC state that pregnancy and pregnancy-related disabilities must, under an employer's insurance plan or sick leave policy, be treated as a temporary disability, subject to the same treatment as all other temporary disabilities. 38 Fed. Reg. 35338.

[21] The excerpts from the legislative history of the proposed Equal Rights Amendment quoted by petitioner GE (Br. 37–41) do not purport to interpret Title VII and do not discuss the question of pregnancy coverage in disability insurance plans.

regulations (45 C.F.R. Part 86, as added, 40 Fed Reg. 24128), which deal with the issue of sex discrimination in federally assisted educational institutions, were promulgated at the direction of Congress, see Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. II) 1681, and signed by the President. The underlying statute, with exceptions not here relevant, provides in pertinent part that (20 U.S.C. (Supp. II) 1681(a)):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program activity receiving Federal financial assistance * * *.

Section 86.57(c) of the Regulations (40 Fed. Reg. 24144) adopted to implement this provision specifically states:

> (c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

This regulation is essentially similar to the EEOC guideline (Appendix, *infra*) at issue in this case. Accordingly, if the HEW guideline and, similarly, the EEOC guideline were in conflict with congressional intent, Congress had the opportunity to so indicate by withholding its approval of the HEW guideline, for, in the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484, Congress required that any regulations implementing Title IX be submitted to both Houses for a review period of forty-five days prior to their implementation.[22]

There is, in sum, no reason to believe that the EEOC guideline at issue here is inconsistent with congressional intent, and the courts below accordingly did not err in relying on it.

II

THE BUSINESS CONSIDERATIONS PROFFERED BY PETITIONERS DO NOT PROVIDE SUFFICIENT JUSTIFICATION TO OVERCOME THE *PRIMA FACIE* VIOLATION OF TITLE VII

Petitioners in both cases offer several considerations to justify the exclusion of pregnancy disability from their plans. Both state that they advert to such "con-

[22] Several members of the House indicated that their review of the HEW regulations would be for the purpose of determining whether any of those regulations would be "inconsistent with the law." See 120 Cong. Rec. H12332–12334 (daily ed. Dec. 19, 1974). The pregnancy regulations were brought to the attention of the Senate by Senator Helms (121 Cong. Rec. S9714–9715 (daily ed. June 5, 1975)) and a resolution of disapproval was introduced by him, but no action was taken on the resolution.

siderations" in order to disprove any intent on their behalf to discriminate against women (see Br. of Lib. Mut. at 15–20; Br. of GE at 53–61). However, as stated above (see pp. 11, 17, 20, *supra*), proof of discriminatory intent is not prerequisite to demonstrating a *prima facie* violation of Title VII.

Under Title VII, an employer may rebut a *prima facie* case in a variety of ways. See, *e.g.*, *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431. In *Robinson* v. *Lorillard Corp*, 444 F. 2d 791 (C.A. 4), the court articulated as follows the standard for measuring an employer's business justification for a practice which has been found to deny employment benefits to a class of individuals protected by Title VII (*id.* at 798):

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.

Here, however, no issue of safety or efficient operation of the employer's primary business is involved, and the issue of cost is the only possible defense. The court's opinion in *Lorillard* and the relevant EEOC guideline (see 29 C.F.R. 1604.9(e)) indicate that a showing of increased cost generally is an insufficient defense to a *prima facie* violation of Title VII.[23] At the very least, we submit, the inquiry in the present

[23] See also *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F. 2d 301 (C.A. 8), certiorari denied, 409 U.S. 1107.

circumstances should be whether the adjustment necessary to eliminate the discriminatory effect of the practice would be so financially burdensome as to jeopardize the entire benefit plan.[24]

In support of their contentions that business considerations militate against extension of disability benefits to women, petitioners offer the following reasons, none of which, in our judgment, suffice to rebut the violation demonstrated.

1. Both petitioners suggest that the "voluntary" aspect of pregnancy justifies the exclusion of pregnancy-related disability from their plans. As stated above (see p. 12, n. 9, *supra*), we note that this distinction, insofar as it has any validity, has been applied only to a disability which occurs solely in women and not to other voluntary disabilities. Also, the actual disability suffered (see I App. 329–330, 362 (testimony of Dr. Forrest), II App. 514 (testimony of Dr. Hellegers)) is like all others covered by the plans in that it generally includes hospitalization for some time and a further period of recuperation.

Similarly, GE states (Br. 55) that the plan's benefits are "intended to soften the blow to employees of an unintended and unexpected sickness or accident" and attempts to distinguish pregnancy on this ground. However, the GE plan does cover other "expected" illnesses (II App. 647–648) and does not cover unexpected complications of pregnancy.

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[24] See also *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (C.A. 5); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (C.A. 2).

Both GE (Br. 56) and Liberty Mutual (Br. 19) state that, due to their belief that a high percentage of women do not return to work following childbirth, pregnancy disability benefits would be a form of "severance pay," a type of benefit not intended by the program. However, there is no indication that when an employee under the existing plans fails to return to work after an absence due to disability, the company seeks to retrieve the money paid so that no "severance pay" is disbursed under the guise of disability benefits.

2. Petitioner GE also states that payment for pregnancy disability would encourage women to leave work earlier and return later than if pregnancy disability were not covered (Br. 56). This absence from employment, the petitioner asserts, would be predicated on the well being of the child, particularly in the period following delivery (*ibid.*).

This contention ignores the fact that it is only the treatment of pregnancy disability which is at issue in these cases. The decisions below do not require an employer to grant a woman leave before disability is suffered, or following recovery from disability; any non-disability leave would be granted by the employer regardless of the outcome of the issue presented here. The precise period of actual disability which would have to be covered by the plans would be determined as it is for all other disabilities—by medical verification, and petitioners offered no evidence to indicate that a requirement of medical verification would be less effective when determining the period of

pregnancy disability than for any other condition covered by the plan.[25]

GE's concern that providing women pregnancy disability leave will lead to a demand by men for paid child-care leave is similarly unfounded. The payment of disability benefits for pregnant women would depend on proof of actual disability.[26] Men requesting child-care leave are, of course, suffering no disability. Any such request by men could be made only when an employer permits women to obtain leave, for child-care purposes, beyond their recovery. (Of course, since the women are, at that point, not disabled, they are not entitled to disability benefits.) To the extent that an employer allows women employees such "child care" leave, the employer may be obligated to provide it to men. See *Danielson* v. *Board of Higher Education*, 358 F. Supp. 22 (S.D. N.Y.); 29 C.F.R. 1604.9(b). However, the court of appeals decisions

[25] The GE plan states that "to collect these [disability] benefits, you must be under the care of a physician for the treatment of your disability and your claim must be certified by a physician" (III App. 1065). See also III App. 1097. Medical testimony at the *Gilbert* trial indicated that it is no easier for one to falsify disability following pregnancy than it would be for one following recovery from any other disability (I App. 337–338; II App. 476), and there was some indication that recovery from pregnancy is easier to determine medically than recovery from some other disabilities. GE's actuary stated that GE's prediction of malingering and claim abuse by women was not based on actual evidence concerning pregnancy, but that malingering and claim abuse was a "general problem" (II App. 535). Accordingly, GE did not demonstrate that claim abuse would be a greater problem for pregnancy disability than for any other disability.

[26] See p. 29, n. 25 *supra*.

in the present cases in no way require employers to grant such non-disability, child-care leave to either women or men, and in no way suggest that leave of this type must be compensated from a disability insurance plan.

3. Petitioner GE introduced some evidence concerning the increased cost of pregnancy coverage. However, that evidence is based on a critical misconception. The evidence introduced at the trial indicated that, on the average, a woman's actual pregnancy-related disability was for a period of six weeks; in other words, that doctors normally checked a woman six weeks after childbirth on the basis that, if no problems had developed, a woman would be fully recovered by that time (I App. 329–330; II App. 465, 500); and medical testimony at the trial indicated that, in many instances, women could recover in as little as two or three weeks following delivery (I App. 330; II App. 466). Medical testimony also indicated that, in most instances where there had been no complication, actual disability did not occur until actual labor and delivery (I App. 321; II App. 460).

The GE actuary who testified (see GE Br. 8, 58) to the estimated increase in benefits paid nationwide, if pregnancy disability were reimbursed, based his calculation on the following presumed duration of pregnancy-related absences: 13 weeks under plans paying benefits for 13 weeks; 23 weeks for plans paying benefits for 26 weeks, and 30 weeks for plans paying benefits for 52 weeks. (See III App. 847, GE Ex. 42.)

This ignored the fact that the average actual period of *disability*, which is the only basis for entitlement to payment, was proved at trial to be *six* weeks, not thirteen, twenty-three, or thirty. For this reason, the figures presented by GE are not accurate when increased cost of covering pregnancy disability is to be considered.[27]

In addition to this erroneous basis, the figures provided by GE referred to nationwide cost, not the cost to GE. Accordingly, the figures do not indicate the extent of the financial effect that the relief requested would have on the disability insurance plans and, hence, certainly do not suffice to establish a business necessity defense to the *prima facie* violation of Title VII demonstrated by the plaintiffs.

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[27] In fact, these figures were based on leaves taken when no medical proof of disability was required (II App. 563).

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted.

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APPENDIX

EEOC GUIDELINES

29 C.F.R. 1604.9. Fringe benefits:

* * * * *

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * * * *

29 C.F.R. 1604.10. Employment policies relating to pregnancy and childbirth:

* * * * *

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

* * * * *

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